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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1015

TRED-AIR OF CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 6-1723

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*	

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Warren Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Tred-Air of California, Inc., a California corporation, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a decision and judgment of that Court which allows and upholds an individual officer

of a California corporation to appear in behalf of his corporation in violation of California laws governing corporations, to represent the corporation before the National Labor Relations Board and its Hearing Examiner.

In the hearing of the corporate labor relations California law forbids anyone *but an attorney at law* to appear for or on behalf of a corporation.

Any individual or officer who is not a licensed attorney and who appears or attempts to appear is guilty of a misdemeanor and his acts are deemed a nullity, and can be prosecuted and punished.[1] Nevertheless, the Ninth Circuit Court of Appeals, contrary to California law, upheld action by the National Labor Relations Board in the absence of any attorney appearing for the corporation, and therefore unrepresented.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S. Codes.

The judgment of the Court of Appeals was rendered December 6, 1972, a copy of which is attached hereto marked Exhibit "A" and made a part hereof. At the writing of this petition, no opinion has been published.

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[1] *Karpel v. California*, 372 U.S. 703, 10 L. Ed. (2) 124; Rehearing denied 374 U.S. 818.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Title 28, Sections 1652 and 1654, U.S. Codes; Fifth Amendment, U.S. Constitution, in its due process clause; Sixth Amendment, U.S. Constitution.

THE FACTS

Tred-Air of California, Inc., was a small California corporation engaged, in Los Angeles County at Bellflower, in the business of retreading aircraft tires. It had eight or nine employees and at times less than that number. Its employees were all non-union. Its president was Odell Lopp.

On January 8, 1970 Odell Lopp hired a nephew, Thomas Lopp, to work in the shop (T. 29), although Thomas Lopp was not a certified tire repairer nor licensed by the F.A.A. with sufficient qualifications under Federal Regulations to work on big tires. (T. 143, 148)

On July 17, 1970 Thomas Lopp was laid off with a note attached to his paycheck that he was laid off for lack of work. No other person has since been employed to do his work. (T. 86-89) The company lost its main contract with Uniroyal Tire Company.

In June of 1970 Thomas Lopp started to Unionize the shop, called on a representative of the Teamsters,

and called a meeting for an election on or about June 2, 1970. Seven employees met on June 4, 1970 and filed an election with the National Labor Relations Board to become unionized.

Thereafter, the Teamsters Automotive Workers Local 495 met at different times with persons they claimed were representing the company. On one occasion the Union representative met with a man named Walker, who it appeared was a C.P.A. accountant for Tred-Air, but it did not appear that any officer or person or lawyer was authorized by the corporation to act for it, not even its non-lawyer president. *Paradise v. Nowlin* 86 Cal. App (2) 898; *Karpel v. California* 372 U.S. 703. At no time was there ever shown that the corporation itself, through its Board of Directors, had received notice, or authorized anyone to act for it.

Odell Lopp was permitted to testify that he had never fired anybody in his life; that Thomas Lopp had been laid off for lack of work and also that Thomas Lopp was not a qualified capper and that he had faced a lawsuit because of damages caused to defective tire work.

The corporation was not represented by an attorney-at-law at the hearing. California law allows only a duly licensed California lawyer to represent the corporation in any litigation. (*Mullin-Johnson Co. v. Penn Mutual Life Ins. Co.* 9 Fed. Supp 175; *Karpel v. California* 372 U.S. 703.

From the beginning, Odell Lopp showed his inexperience and inability to represent or act on behalf of the corporation or anyone. As set out in the findings of fact by the Trial Examiner, the following took place:

"TRIAL EXAMINER: Mr. Lopp, are you an attorney?

"MR. LOPP: No.

"TRIAL EXAMINER: Do you believe that you can represent the Respondent in this proceeding?

"MR. LOPP: I never went into this before. I don't know if I can or not. I didn't get an attorney because I didn't think it was necessary to get one. Maybe it is.

"TRIAL EXAMINER: Well. that is something you have to decide. I take it you have given some thought to the matter.

"MR. LOPP: Well, as far as that goes, I don't think that an attorney could help in this case. I haven't even talked to an attorney.

"TRIAL EXAMINER: Have you given any thought to whether you want to be represented by an attorney?

"MR. LOPP: I wanted to get it handled today and if I had gotten it handled by an attorney, I would have gotten an attorney and I would have had to wait and I wanted to take my chances on it today.

"TRIAL EXAMINER: Then, you are satisfied to go ahead?

"MR. LOPP: Right." (T. 2-3)

Again, during the proceedings, the Examiner had to remind Lopp that he was not an attorney and did not understand the proceedings. (T. 101-105)

Nevertheless, the Examiner went ahead to conduct the hearing with no one in authority actually representing the corporation as an attorney.

Following the close of the hearing, counsel was retained on behalf of the corporation. A resolution of the Board of Directors was duly adopted and forwarded to the Branch Office of the National Labor Relations Board in San Francisco, containing the following:

> "... The respondent corporation failed to appear by counsel and only an attorney at law can represent a corporation and bind it in California. *Pacific Employers' Insurance Co. v. Carpenter,* 10 C.A. 2d 595; see other cases cited in brief.
>
> "... It is respectfully requested that the denial of counsel for the corporation to appear was a denial of Due Process of law and the Equal Protection of the law also, rights guaranteed by both the Fifth and Sixth Amendments of the U.S. Constitution, and that all the proceedings be set aside and the case sent back for complete new hearing with representation by counsel for the corporation.
>
> "I enclose herewith also a corporate resolution appointing me as counsel for Tred-Air of California, Inc."

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The request was denied and the Trial Examiner's decision followed.

Tred-Air duly filed its exceptions to the Trial Examiner's decision and recommended order and brief in support thereof. On October 21, 1971 the National Labor Relations Board adopted the recommended order of the Trial Examiner and ordered Tred-Air of California, Inc., its officers, agents, successors, and assigns, to take the action set forth in said recommended order of the Trial Examiner. A copy of the National Labor Relations Board's order of October 12, 1971, incorporating the recommended order of the Trial Examiner, it attached hereto as Appendix A and made a part hereof by reference.

On November 18, 1971, Tred-Air of California, Inc. filed a petition for review of the order of the National Labor Relations Board with the Honorable Court of Appeal for the 9th Circuit of the United States. That court affirmed the National Labor Relations Board decision and ignored California Law as governing Corporate Rights.

The trial examiner also had ignored the laws of the State of California and the Constitution of the United States in arriving at his decision. He held, contrary to Title 28, Section 1652, U. S. Codes, that National Labor Relations Board Action is governed by Federal Law, not California Law. (Opinion, p. 3) Title 28, Section 1652 is Federal Law.

The laws of the State of California hold that a corporation is a separate entity from its stockholders or officers, and that only a licensed attorney can represent it.

The National Labor Relations Board was notified that the law of California did not permit anyone but an attorney to represent the corporation. This request was ignored.

QUESTIONS PRESENTED BY THIS PETITION

1. Whether the laws of the State of California governing corporations and the exclusive right to have only an attorney at law duly licensed by the state to represent a corporation govern the National Labor Relations Board in respect to who can appear for a California corporation, and act in its behalf, and whether Title 28 Section 1652 U.S. Code govern the proceedings had in this case.

2. Whether the Trial Examiner, on notice that the only person appearing for the corporation is its individual president, who is not an attorney at law duly licensed in this state may proceed until an attorney is selected to represent the California corporation.

3. Whether the failure to require the corporation to have counsel results in a denial of due process of law guaranteed by the 5th Amendment U.S. Constitution and to void the judgment.

4. Whether the judgment and order against Tred-Air is a nullity and void and in violation of due pro-

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cess of law guaranteed by the Fifth Amendment U.S. Constitution (*Powell v. Alabama* 287 U.S. 45)

5. Whether the judgment against Tred-Air denied the corporation due process and equal protection of the laws and violated Title 28, Section 1652, U.S. Codes.

6. Whether the evidence was insufficient to establish any violation of the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

Federal law as well as state law, by court decision, has held that in California (and elsewhere) only an attorney can appear to represent it in legal matters for a corporation. Title 28, Section 1654, does not authorize a corporation to plead and manage its case personally or through an agent who is not an attorney. (*Mullin-Johnson Co. v. Penn Mutual Life Ins. Co.* (D.C. Cal.), 9 F. Supp. 175; *Brandstein v. White Lamps Inc.* (D.C. N.Y.) 40 F. Supp. 369. The National Labor Relations Board is governed by this section. Title 28 Section 1652 provides that the decision of the state shall govern these proceedings.

In *Paradise v. Nowlin* 86 Cal. App. (2) 898 the court held [2] *Appearance—Who May Appear.*— A corporation cannot represent itself in court, either in propria persona or through an officer or agent who is not an attorney; it can be represented in court only by a licensed attorney.

MOTION to dismiss an appeal. Motion granted.

Federated Income Properties, Inc., in pro. per., for Appellant.

Snyder & Fletcher for Respondents.

"A composite of the rule in the decided cases, overwhelmingly sustained by the authorities, may be thus stated: A natural person may represent himself and present his own case to the court although he is not a licensed attorney. A corporation is not a natural person. It is an artificial entity created by law and as such it can neither practice law nor appear or act in person. Out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona. (*Bennie v. Triangle Ranch Co., 73 Colo.* 586 [216 P. 718]; *Mortgage Comm. v. Great Neck Imp. Co.,* 162 Misc. 416 [295 N.Y.S. 107, 112]; *Aberdeen Bindery v. Eastern States etc. Co.,* 166 Misc. 904 [3 N.Y.S. 2d 419, 423]; *Finox Realty Corp. v. Lippman,* 163 Misc. 870 [296 N.Y.S. 945, 949]; *J. T. Whalen, Inc. v. Pritzert,* 167 Misc. 471 [3N.Y.S. 2d 418]; *Nispel v. Western Union R. R. Co.,* 64 Ill. 311, 314; *Nixon, Ellison & Co. v. Southwestern Ins. Co.,* 47 Ill. 444, 446; *Kankakee Drainage Dist. v. Commissioners,* 29 Ill. App. 86, 87; *State Bank v. Bell, 5 Blackf.* (Ind.) 127; *Culpeper Natl. Bank v. Tidewater Imp. Co.,* 119 Va. 73 [89 S.E. 118, 120]; *Clark v. Austin,* 340 Mo. 467 [101 S.W. 2d 977, 982]; *New Jersey Photo Eng. Co. v.*

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Carl Schonert & Sons, 95 N.J.Eq. 12 [122 A. 307]; *Black & White Operating Co. v. Grosbart,* 107 N.J.L. 63 [151 A. 630, 633]; *State v. Passaic Co. Agr. Soc.,* 54 N.J.L. 260 [23 A. 680]. See also *Union Pacific Ry. Co. v. Horney,* 5 Kan. 340, 347; *Cary & Co. v. F. E. Satterlee & Co.,* 166 Minn. 507 [208 N.W. 408, 409]; *arguendo, Osborn v. Bank of United States,* 9 Wheat. (22 U.S.) 738, 830 [6 L. Ed. 204, 226].)

"The federal courts have held that the provisions in the statute that 'the parties may plead and manage their own cases' or by attorney ([Rev. Stats. §747], 28 U.S.C.A. §394) (Now 28 U. S. Code 1654) does not authorize a corporation to plead and manage its case personally or through an agent who is not an attorney of the court. (*Mullin Johnson Co. v. Penn. Mut. Life Ins. Co.* (D.C. Cal. 9 Fed.Supp. 175; *Brandstein v. White Lamps, Inc.* (D.C.N.Y.) 20 Fed.Supp. 369.)"

In *Himmel v. City Council* 169 Cal. App. (2) 100 the Court said:

"[1] Primarily the propriety of the court's order striking complaint Number 2 depends upon whether in California a corporation may sue in propria persona. That it may not has been flatly determined in this state. *Paradise v. Nowlin* (1948), 86 Cal.App.2d 897 [195 P.2d 867], so holds (p. 898): "A natural person may represent himself and present his own case to the court although he

is not a licensed attorney. A corporation is not a natural person. It is an artificial entity created by law and as such it can neither practice law nor appear or act in person. Out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona [Citations.]"

In 19 C.J.S. Section 1368 the law is stated as follows:

A corporation can appear only by attorney, and an appearance by a duly enrolled attorney is presumably lawful and authorized, the burden resting on the corporation to show that it was unauthorized. A voluntary general appearance by a corporation is a waiver of all defects in the service of process.

A corporation cannot appear in person, but must do so by attorney. Where a duly enrolled attorney of the court appears for the corporation, his appearance is presumably lawful and authorized, and the burden is on the corporation to show that it was unauthorized.[22]

Service. Where a statute provides the mode of service on a corporation by which the court acquires jurisdiction, the method of service prescribed must be followed, unless waived by the corporation, and in the absence of a compliance

[22]N.J.—State v. Passaic County Agricultural Soc., 23 A. 680, 54 N.J.Law 260.

with the statutory requirement a trial cannot legally proceed.[20]

Wherefore Tred-Air of California, Inc., prays that this court reverse the judgment and orders below.

In *Erie R. Co. v. Tompkins,* 304 U.S. 64, the court in overruling *Swift v. Tyson,* 41 U.S. 1 said that *Swift v. Tyson* doctrine was an unconstitutional invasion of rights *reserved to the states.* The court said "Except in matters governed by the Constitution or by acts of Congress, the law to be applied *in any case* is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. (304 U.S. 78)

We submit that Congress in its National Labor Relations Act did not intend to supplant or repeal or limit the law and decisions of the State of California as to who may legally represent a corporation of the state, namely only an attorney at law, duly licensed as such in that state. Federal case law also confirms. (*Mullin Johnson Co. v. Penn Mutual Life Ins. Co.* 9 Fed. Supp. 175, *Brandstein v. White Lamps Inc.* 20 Ed. Supp. 369; 19 C.J.S. Sec. 1368).

The decision of this court holding that Tred-Air Inc. was not duly and legally represented and that the orders of the National Labor Relations Board are

[20]Okl.—Hardeman King Co. v. State, 233 P. 792, 793, 29 Okl. Cr. 14a C.J. p. 880 note 60.

therefore void and of no effect is highly important and the decisions below must be reversed in accordance with the holdings of the laws and court decisions of the State of California.

Respectfully,

MORRIS LAVINE,

Attorney for Tred-Air of California, Inc.

Appendix

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRED-AIR OF CALIFORNIA, INC., Petitioner,	)	
v.	)	No.
NATIONAL LABOR RELATIONS BOARD,	)	71-2848
Respondent.	)	

JUDGMENT

Before: HUFSTEDLER, WRIGHT and GOODWIN, Circuit Judges.

THIS CAUSE came on to be heard upon the petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board, dated October 12, 1971, against the Petitioner, Tred-Air of California, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 3, 1972, and has considered the briefs and transcript of record filed in this cause. On June 29, 1970, the Court being fully advised in the premises, handled down its order granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Tred-Air of California, Inc., its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Unlawfully interrogating, threatening or promising benefits to its employees.

2. Unlawfully discharging employees or otherwise unlawfully discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

3. Unlawfully failing or refusing to bargain collectively with Teamsters Automotive Workers Local 495 as the certified representative of its employees.

4. In any other manner interfering with, restraining or coercing its employees in the exercise of any right guaranteed in Section 7 of the Act.

B. Take the following affirmative action:

1. Offer to Thomas E. Lopp immediate and full reinstatement to his former or a substantially equivalent position, and make him whole for any loss of earnings he may have suffered by reason of Petitioner's discrimination against him, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

2. Notify the above-named employee, if presently serving in the Armed Forces of the United States, of

his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

3. Preserve and make available to the Board or its agents on request, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Judgment.

4. Upon request, bargain collectively with Teamsters Automotive Workers Local No. 495 as the certified representative of its employees, and embody in a signed contract any understanding reached.

5. Post at its plant in Bellflower, California, copies of the attached notice marked "Appendix." Copies of said notice on forms provided by the Regional Director for Region 21 of the National Labor Relations Board, (Los Angeles, California), after being signed by a representative of the Petitioner, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

6. Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

With costs in this Court in favor of the Board and against respondent. Costs: One-half claimed cost of brief of the Board. $80.00.

Enforced, Judgment Filed and Entered Dec. 6, 1972.
DENNIS R. MATHEWS
/s/ Dennis R. Mathews
Clerk
/A TRUE COPY
ATTEST:
DEC. 11, 1972.
DENNIS R. MATHEWS
Clerk
By R. D. Hewitt,
Deputy

SO ORDERED,
SHIRLEY HUFSTEDLER,
EUGENE A. WRIGHT,
ALFRED T. GOODWIN
Circuit Judges

FILED DEC. 6. 1972
DENNIS R. MATHEWS,
Clerk U.S. Court of Appeals
Docketed

APPENDIX "B"

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

AN AGENCY OF THE UNITED STATES GOVERNMENT.

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection; and

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unlawfully discharge employees or otherwise discriminate against them because of their union activities.

WE WILL NOT unlawfully question, threaten or promise benefits to our employees.

WE WILL OFFER to take back Thomas E. Lopp to his old job and pay him for all the wages he lost because of his discharge.

WE WILL, upon request, bargain collectively with Teamsters Automotive Workers Local No. 495 as the certified representative of our employees.

TRED-AIR OF CALIFORNIA, INC.
(Employer)